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NO. 85-1590

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

PHILLIP J. KIRK, JR.,

PETITIONER,

v.

THOMAS S., appt't guardian ad litem,
JOYCE BROOKS,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. DID THE DISTRICT COURT CORRECTLY RULE THAT THOMAS S. HAS A SUBSTANTIVE DUE PROCESS RIGHT TO MINIMALLY ADEQUATE TREATMENT PROTECTED BY THE FOURTEENTH AMENDMENT AS INTREPRETED BY THE SUPREME COURT IN YOUNGBERG v. ROMEO, 457 U.S. 307 (1982)?

II. WAS THE STATE RESPONSIBLE DIRECTLY, AND INDIRECTLY THROUGH LOCAL GOVERNMENTAL AGENCIES UNDER ITS SUPERVISION AND CONTROL, FOR PROVIDING TREATMENT REQUIRED BY THE FOURTEENTH AMENDMENT?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondent Thomas S. respectfully requests this Court to deny the petition for a writ of certiorari seeking review of the Fourth Circuit Court of Appeals' judgment in this case, as reported at 781 F.2d 367.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Petitioner's Statement of the Case contains many factual inaccuracies with no citation to the Record to support his assertions. Thus, to give the Court an accurate view of the facts, the respondent is obliged to provide the following summary of the facts with references to the Record.

Thomas S. is a twenty-two year-old, legally incompetent ward of the State of North Carolina. He has spent his entire life in state custody or control and has lived in over forty foster homes, rest homes, psychiatric hospitals, and other institutions. When summary judgment was entered by the district court, Thomas was housed in the Gaston County detoxification facility because the defendants had no other place to put him. The facts leading to his placement in the detoxification facility are summarized below and are drawn from defendants' admissions, affidavits, the decision of the Fourth Circuit Court of Appeals, and other undisputed sources.[1]

Thomas' mother gave him up for adoption at birth, so that from infancy until age eighteen he remained in the custody

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[1] The decision of the Court of Appeals (Petition, App. A) contains a thorough chronology of Thomas' treatment history and recommendations of professionals who have evaluated him. It was accurately and painstakingly gleaned by the court from the voluminous record in this case. Respondent's summary of facts will be more succinct but is entirely consistent with the facts described in Court of Appeals' decision.

of the Gaston County Department of Social Services (hereinafter, "DSS"). No adoptive placement was ever arranged. Shortly after Thomas' eighteenth birthday, DSS initiated an incompetency proceeding, and thereafter Thomas was declared legally incompetent. Defendant Allen Childress was appointed guardian for Thomas under the authority of N.C.G.S. §122-24.1 and §35-1.28 in his official capacity as Regional Adult Mental Health Specialist of the Department of Human Resources (hereinafter referred to as "DHR"), Division of Mental Health, Mental Retardation, and Substance Abuse Services. (Petition, A 3-6 [Court of Appeals' decision]).

Thomas has had many diagnoses, including schizophrenia and borderline mental retardation. Petitioner Kirk[2] concedes that he presently suffers from "borderline personality disorders with mixed features." (Appendix C, which is the Joint App. to the Fourth Circuit, 57-58). Whether or not he is mentally retarded is irrevelant to the issues presented by this petition.

Thomas' present problems as a legally incompetent adult are inextricably tied to the problems which he faced as a child in the care and custody of DSS. In an affidavit submitted by Petitioner Kirk, one of his employees, Broughton pyschologist William Wellborn, said, "[i]t should be noted that since the age

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[2]North Carolina Department of Human Resources (DHR) Secretary Phillip J. Kirk, Jr., has been substituted for the initial defendant, Sarah T. Morrow, who was sued in her official capacity as DHR Secretary.

of six days, Tom has lived in a total of forty different foster homes and institutions in Western North Carolina." (App. C, 101).

Through the years of Thomas' childhood, DSS caseworkers had resorted to placing Thomas in any spot available and were unable to provide consistent support and guidance to assure that the placements were appropriate or successful. Thomas' odyssey carried him to a Burke County rest home for the elderly, Gerald's Lazy Acres, where he remained from June 1981 until March 1982. By defendants Kirk's and Childress' admission, the rest home was an inappropriate placement. Defendants concede that there were no appropriate homes or other appropriate community based treatment facilities in Gaston County where Thomas could have gone during this period. (App. C, 59).

Thomas was living at Gerald's Lazy Acres in February 1982 when Allen Childress was appointed as his guardian. Upon his appointment,

> The guardian visited Thomas at Lazy Acres and decided that the rest home was an inappropriate placement. The guardian later commented on Thomas' condition at the time: "He weighed 197 pounds and was taking five separate medications, which effectively subdued his personality. He was the only person of his age in that rest home. He had no social or recreational or educational or vocational opportunities, and no access to therapeutic counseling." Sleeping, eating, and listening to the radio were Thomas' main activites at Lazy Acres. He gained at least 25 pounds and became emotionally unstable and hallucinatory.

Court of Appeals decision, (Petition, App. A 6, 7).

Childress, acting as Thomas' guardian, had him admitted to the "R" (mental retardation) unit at Broughton Hospital on

March 15, 1982. This was Thomas' fourth admission to Broughton Hospital. One of the reasons that Childress placed Thomas at Broughton in the first place was to give Gaston County officials an opportunity to identify appropriate resources for Thomas needs. (App. C, p. 203).

When Thomas was admitted to Broughton, petitioner knew that community placement -- not psychiatric hospitalization -- had been prescribed following two separate evaluations by two state agencies, the Psychiatric Clinic at North Carolina Memorial Hospital in Chapel Hill, North Carolina and by the Division for Developmental Disorders of Learning (hereinafter referred to as "DDDL") at the University of North Carolina in Chapel Hill. (Petition, A 5-6). Following his placement at Broughton Hospital in March 1982, Thomas was again evaluated by the staff at Broughton, and community placement was again recommended (App. C, 105). Defendant Childress accepts the DDDL evaluation as valid and considers the Broughton evaluation to be "very consistent" with the DDDL evaluation. (App. C, 208-209). The DDDL evaluation recommended, among other items:

a. An educational program to address the deficits in academic skills and to expand his general knowledge . . . .
b. Ongoing psychotherapy.
c. Opportunities for social interactions with his peers.
d. Consistent medical care.
e. Pre-vocational training . . . .
f. Training in self-care and domestic skills.
g. Sex education.
h. Opportunities to practice in the community the skills he already has and those he will be acquiring before he is discharged from this supervised environment.

Upon Thomas' March 1982 admission to Broughton, treatment plans were designed for him that anticipated community placement "within three to six months." Further, defendants admitted that "Tom basically needs to be a part of a home where he can establish family ties in order to mature and develop through the natural progression of growing up to adulthood. He was hardly ever in any place long enough to put down any roots." (App. D, 274).

In discussing Thomas' needs, Childress stated that it was "very important" for Thomas to develop relationships with non-handicapped peers his own age. According to Childress, "[h]e is developing a resistance in being housed and located with handicapped people." (App. C, 210). Defendants Kirk and Childress admit, however, that Thomas had little opportunity at Broughton Hospital to interact with non-handicapped persons other than human services providers employed there. (App. C, 210; App. D, 265-266).

Similarly, Broughton was unable to give Thomas opportunities to practice his independent living skills in the community, as prescribed by DDDL. In answer to interrogatories executed on January 7, 1983, Defendants Kirk and Childress stated, "Thomas S. now needs an opportunity to exercise these skills in the community when placement is identified." [emphasis added] (App. D, 272). In other words, at the time Kirk and Childress made this statement, Thomas had sat in Broughton for over nine months without an

opportunity or the motivation to exercise community living skills that had consistently been prescribed by treating professionals evaluating him.

Kirk's and Childress' own records are filled with admissions that the main reason that Thomas remained in Broughton for so long was that there was simply no appropriate place for him to go. (As stated previously, one of Childress' reasons for admitting him to Broughton in the first place was to enable Gaston County officials to identify appropriate community resources for his needs.) As early as June 2, 1982, a Broughton Hospital professional wrote to Lincoln Area Mental Health stating:

> "We anticipate that Tom will be discharged by the [Burke County District] court on June 17, 1982.
>
> . . . .
>
> "We have identified the following needs as priority:
>
> 1. Community-based living either in a group home or adult foster care home.
> 2. Sheltered Workshop activities or some type of daily vocational training activity.
> 3. Involvement with the local mental health center for medication review and counseling to improve his self-concept/self-esteem.
>
> The team feels that Tom basically needs to be a part of a home where he can establish meaningful relationships and that will provide structure to allow him to mature and develop through a natural progression to adulthood."

Court of Appeals Decision, (Petition App. A 8).

On June 25, 1982, Allen Childress wrote a letter to the director of the Gaston-Lincoln Area Mental Health Program, stating:

> "It was immediately evident in the meeting at the Gaston Mental Health Center on May 21st that Gaston County simply has no appropriate facilities to handle young adults with emotional problems such as Tom's . . . .
>
> A follow-up to May 21st meeting held at Broughton Hospital on June 10th concluded that, "while Gaston County Agencies could respond to some of Tom's need," they did not have the comprehensive array of services which would permit Tom to return to Gaston County. . . . I feel that Tom has been moved around too much during his short lifetime. He needs, as stated above, a stable home, meaningful relationships and sufficient structure to permit him to grow and develop. And as his guardian I feel that Gaston County has an obligation to provide the services for Tom which allow him an opportunity to live and work in his home community. Since placement at Broughton will not meet Tom's long term needs, we have no alternative other than to work toward community placement in all due speed. This is the only course of action which is in Tom's best interest."

App. C, 174-176).

What did Allen Childress mean when he wrote on June 25, 1982, that community placement should be arranged with "all due speed"? In his deposition on October 26, 1982, he discussed the letter:

> A: I think at that time [June 25, 1982], that Tom was appropriate [sic] for community placement that would fulfill the needs indicated in the letter.
>
> Q: Is that still the case?
>
> A: Yes. It is more the case.
>
> Q: Why all due speed?
>
> A: Well, all due speed in my usage of the phrase here means that we need to begin a process of placement for Tom. The all due speed could refer to one, two or three months, or something of that nature.

Q: It has been more than one to two to three months since that letter, hasn't it?

A: Yes, it has.

Q: Why was it necessary to do this in one, two or three months?

A: Well, it was my understanding that it was difficult for the community to provide the services necessary for Tom's placement. My thought was that we needed to get onto [sic] that. We needed to develop a plan and start the process of making arrangements for Tom's community placement.

Q: Has that happened?

A: I have no knowledge of that.

App. C, 212-213.

What arrangements were being made in Gaston County for Tom's community placement? None. In a letter to plaintiff's counsel on June 17, 1982, the Gaston-Lincoln Area Mental Health director said:

> "You may remember that the reason [Childress] was appointed his guardian was that services for Tom were simply not available in Gaston County, or to my knowledge, anywhere in the State of Nortn Carolina. . . . We simply cannot provide services that we do not have, and we cannot generate these services without funds being made available to us. It would, therefore, seem to me that the agency to be named would be the Department of Human Resources for the State of North Carolina."

App. C, 170.

Allen Childress concedes that he knew of no appropriate placement facility for Thomas in Western North Carolina. (App. C, 223).

In November 1982, eight months after admission to Broughton, Thomas was still waiting for the treatment prescribed by every professional who had seen him. In that month, according to affidavits submitted by Kirk, a two-day evaluation of Thomas was made by the North Carolina Division of Mental Health to develop a discharge plan. In that plan, these observations were made:

> "Tom is extremely aware that he is living with mentally retarded individuals and often voices his thoughts of not wanting to be around 'those retarded people.' We feel this is a normal and healthy reaction to being housed in this situation.
>
> The team feels Tom has received maximum benefit from training and counseling in the institutional setting and is now ready for community placement. Tom no longer requires custodial care in an institutional level, and continued provision of this would be inappropriate. The desired placement for him would seem to be an adult foster care situation in which he would live in a family home with parents who could provide the love and caring and structure that Tom needs to complete the maturation process toward adulthood.

App. D, 277

A nine-page report prepared by Dr. Wellborn and the treatment team at the conclusion of this evaluation devised a plan for Thomas' discharge from Broughton Hospital on November 24, 1982, which again recommended placement in an adult foster care situation, a group home, or a family care home providing needed services. Thomas' discharge, however, remained months away.

Thomas was finally discharged from Broughton on March 3, 1983 in anticipation of more appropriate treatment under the terms of a one-year consent judgment in this action. Under the terms of the judgment, Thomas lived in a unique, specialized adult foster family setting in Cleveland County. Two local defendants, (later dismissed from the case), Melton and Carpenter, had agreed to enter the consent judgment which expired on February 28, 1984. Petitioner Kirk provided special funding for the treatment.

Thomas' specialized foster family placement was successful for approximately nine months. The placement failed in part because of a sudden interaction with Thomas' natural family and the placement of another person in the foster family. On November 13, 1983, Thomas was involuntarily committed to Broughton Hospital. It was his fifth such hospitalization. On November 30, 1983, Thomas was moved from Broughton to a Morganton group home for the developmentally disabled, the McKay Home.

Thomas remained at the McKay Home until May 18, 1984. While he was a resident of McKay Home, Tom participated briefly in a day treatment program in Caldwell County. Neither the group home nor the day treatment program were suited for Thomas' specific needs, but it was the least objectionable arrangement that his guardian and local government agencies could find given existing programs and facilities in North Carolina. On May 18, 1984, Thomas was moved to a rest home in Wilkes County, but on August 17, 1984, the rest home placement was terminated. The rest home

was not appropriate, and its failure should have been predicted. Approximately ninety adults reside at the rest home, most of whom are geriatric patients. It is not a family-like setting. It is approximately nine miles from town and is not served by public transportation, so that Thomas' participation in community activities was limited. The staff was not trained to meet Thomas' needs.

When Thomas was dismissed from his Wilkes County treatment program, he was returned to Gaston County. Once again, there was no place for him to go, so he was housed in the Gaston County detoxification facility. Petitioner Kirk calls this placement a "night care facility."[3] Thomas was held in "night care"

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[3]Petitioner Kirk has consistently tried to characterize this detoxification facility as "night care" and has even taken to spelling it as a proper noun, as if to give it special significance ("Night Care"). At the time of entry of summary judgment, however, the record showed without dispute that Thomas S. was housed in the Gaston County detoxification facility. (App. D, 368-369). The District Court also described the facility as detoxification. (Petition, App., A-49). When counsel for petitioner attempted to deny that Thomas was housed with alcoholics in oral argument before the Court of Appeals, respondent filed a supplemental brief containing an affidavit of Thomas S. to illuminate the record that was before the court at the time summary judgment was entered. (Respondent, App. B). His affidavit shows that there is no practical distinction between night care and detox, that residents are supervised by the same staff, eat the same food brought to them in styrofoam from the Gaston County jail, reside on the same ward, and congregate in the same common areas. For the sake of having company, Thomas sometimes attended Alcoholic Anonymous meetings held in the facility. Thomas has never had a drug or alcohol problem.

for almost seven months, living with a transient population of alcoholics and drug abusers before finally being placed with a specialized, adult foster family recruited and trained under the terms of the district court judgment. Petitioner has attempted to characterize this "night care" as a noninstitutionalized community placement that would somehow serve as a reason for granting the writ. (Petition, p. 6). There is nothing in the record showing that his placement in the detoxification facility was based on any professional judgment, that Thomas has a drug or alcohol abuse problem, or that being housed with others who do have such problems would answer his treatment needs. (Petition, App. A 15-17 [Court of Appeals decision]).

B. HISTORY OF THE CASE

On July 7, 1982, Thomas S. brought suit against Sara Morrow, then Secretary of the North Carolina Department of Human Resources; Allen Childress, in his offical capacity as Thomas' guardian; and the directors of two local agencies, the Gaston County Department of Social Services and the Gaston-Lincoln Area Mental Health Program.

The complaint alleged that defendants had denied Thomas' substantive due process rights under the Fourteenth Amendment for failure to provide minimally adequate treatment, that Thomas' hospitalization imposed a degree of restraint on his liberty inconsistent with professional judgment concerning his treatment needs, and that improper treatment violated various state law pro-

visions. An amended complaint later charged that defendants had deprived Thomas of substantive liberty interests created by state law. Thomas requested injunctive relief requiring defendants to place him in an appropriate treatment setting and provide other treatment recommended by professionals who had examined and worked with him. Unlike Youngberg, infra, no damages were sought.

The court entered a one-year consent order on May 26, 1983, permitting the two local agency defendants to contract with an independent non-profit organization for foster care treatment through March 1, 1984. Because of the consent order, the court deferred all parties' summary judgment motions and declared the case inactive until February 1, 1984.

The case was later reactatived, and the district court ruled on cross motions for summary judgment on September 18, 1984. Various claims against state defendants under state law were dismissed, and the court dismissed without prejudice claims against local officials. It also granted summary judgment against Petitioner Kirk and Thomas' guardian, Allen Childress.

On December 7, 1984, the court entered a final judgment requiring Kirk and Childress to develop a treatment plan for Thomas. It further directed these defendants to furnish Thomas with treatment recommended by the qualified professionals who had evaluated his needs, including suitable residential placement and non-residential services.

The defendants appealed, and the district court judgment was unanimously affirmed on January 9, 1986, in a decision reported at 781 F.2d 367 (Petition, App., A). Thereafter, Petitioner Kirk's petition for rehearing was denied (Petition, App., B), and his motion for stay of mandate was similarly denied (Petition App. C).

SUMMARY OF ARGUMENT

A.

The district court correctly ruled that Thomas S. has a substantive due process right to minimally adequate treatment protected by the Fourteenth Amendment as intrepreted by he Supreme Court in Youngberg v. Romeo, 457 U.S. 307 (1982).

The district court and the Court of Appeals carefully followed the guidelines established by the Supreme Court in Youngberg in finding that the treatment that Thomas S. has received departs substantially from the recommendations of Petitioner Kirk's treating professionals and others who have evaluated Thomas. The court further found that Thomas was entitled to receive minimally adequate treatment based upon clearly identified liberty interests.

The decision is entirely consistent with the decison of every circuit court that has considered the issue since Youngberg.

B.

The district court correctly held Petitioner Kirk ultimately responsible for providing services and supervising local government agencies under his control.

Petitioner Kirk's argument that local agencies should be responsible for Thomas' treatment totally ignores North Carolina

law that makes petitioner responsible for the conduct of the local agencies. Further, petitioner Kirk did not appeal the dismissal of the local agencies as parties in this action.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT THOMAS S. HAS A SUBSTANTIVE DUE PROCESS RIGHT TO TREATMENT PROTECTED BY THE FOURTEENTH AMENDMENT.

A. Thomas S. has standing to claim the right to treatment established in Youngberg v. Romeo because from birth he has been under state guardianship and control.

In Youngberg v. Romeo, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed. 2d 28 (1982), the Supreme Court held that an involuntarily committed, mentally retarded adult has a substantive due process right to treatment. Petitioner Kirk seems to claim that Youngberg has no bearing on Thomas' case because Thomas is not similarly situated. According to Kirk, Thomas is not subject to the control of the state, so that no constitutional rights are implicated. (Petition, p. 7). He makes this claim by totally ignoring the facts in the record, creating a fictitious plaintiff more to his liking, and arguing his case based upon his fiction. Unfortunately, Thomas S. is not a fictional character. When the district court entered summary judgment, Thomas was institutionalized in the Gaston County Detoxification Facility.

Petitioner attempts to characterize this detoxification placement as community living free of state action or state control. Thomas stayed there from August 1984 until February 1985. He was placed by Kirk's agents because they had no other place

for him to go. There is absolutely nothing in the record to suggest that Thomas has ever had a drug or alcohol problem, and Kirk has offered no justification for his confinement in the detoxification facility. (Petition, A 15-17 [Court of Appeals decision]). As a result of the district court's judgment, Thomas was finally released from the detoxification facility and placed with an adult foster family. (Joint App. D, p. 268). He did not choose to live in the detoxification center, and he could not choose to leave because Allen Childress has been appointed his guardian in his official capacity as a DHR employee. Only Allen Childress has legal authority to make those decisions for Thomas. N.C.G.S. §35-1.1 et seq. Except for a brief period between his eighteenth birthday and the appointment of Childress as his guardian, Thomas has spent his entire life in state custody and control. The state has total control over what Thomas eats, where he sleeps and how his money will be spent. Many of the problems he now faces as a legally incompetent adult are rooted in inappropriate treatment and placement as an adult under state guardianship and control and that he faced as a child in the custody of the Gaston County DSS, which is under petitioner Kirk's control and is his agent by state law. N.C.G.S. §108A-14(5).

Thomas S. was declared incompetent, and Allen Childress was appointed as his guardian under the provisions of North Carolina's Guardianship Act, N.C.G.S. §35-1.6 et seq. Childress is Thomas' guardian. Thomas is Childress' ward. Childress is

acting as Thomas' guardian in his capacity as a state employee. Therefore, Thomas is a ward of the state, and the guardian's actions restricting Thomas' liberty constitute "state action." Parham v. J.R., 442 U.S. 584, 600-1 (1979).

The court of appeals correctly noted that the district court's reliance upon Youngberg was proper:

> There are, of course, differences between Youngberg and Thomas' case. In Youngberg the court dealt with a claim for damages against state officials for breach of constitutional rights. 457 U.S. 311. Thomas does not sue for money; he seeks only the treatment that professionals at a state hospital have prescribed. But this distinction between the cases does not militate against Thomas. The principles undergirding the court's decision and the action for damages afford a sound foundation for the exercise of equitable powers to fashion remedial, prospective relief. See, Scott v. Plante, 691 F.2d 634, 637 (3rd Cir. 1982). Much of Youngberg necessarily addresses the situation of a single patient confined to an institution, but the court did not intend the liberty interest it identified to be limited to that circumstance. The liberty interest protected in Youngberg did not arise because of the institutional confinement. Rather, the court's premise was that involuntary commitment and other lawful confinement "do not extinguish" pre-existing liberty interests in safety and freedom from bodily restraint. 457 U.S. at 315.

Petition App., A-15.

There is no substantive difference between the involuntarily committed plaintiff in Youngberg and Thomas, who has been "volunteered" for commitment by his court-appointed guardian. Both actions involve "massive curtailment of liberty" against an

individual through state action. Humphrey v. Cady, 405 U.S. 504, 509 (1972).

If Thomas S. had not spent his entire life under state guardianship and control, if he had voluntarily chosen to live in the detoxification facility after intelligently considering other residential options, if he could have voluntarily left the facility, and if he could make decisions for himself concerning his treatment, then perhaps petitioner's argument would have merit. But given the state's total control over Thomas' life, liberty, property and treatment, Thomas is entitled to minimally adequate treatment under Youngberg.

B. Thomas S. has been denied minimally adequate treatment prescribed by qualified mental health professionals who have evaluated his needs.

The district court held that the substantive due process liberty interests recognized in Youngberg require defendants Kirk and Childress to provide Thomas with reasonable treatment consistent with professional judgment. (Petition App., A 32-39). The plaintiff in Youngberg was profoundly mentally retarded with an I.Q. of 8 to 10, and his attorneys noted that no amount of treatment would make his release from the hospital possible. 102 S.Ct. at 2459. Thus, the Supreme Court held that under the plaintiff's particular circumstances, the only liberty interests implicated required the state to "provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint." Id. at 2460. In so holding, the Court noted that the

training or treatment should be tailored to the particular needs of the individual:

> It is not feasible, as is evident from the variety of language and formulations in the opinions below and the various briefs here, to define or identify the type of training that may be required in every case. A court properly may start with the generalization that there is a right to minimally adequate training. The basic requirement of adequacy, in terms more familiar to courts, may be stated as that training which is reasonable in light of identifiable liberty interests and the circumstances of the case. A federal court, of course, must identify a constitutional predicate for the imposition of any affirmative duty on a state.

102 S.Ct. at 2460, n. 25.

The Court unanimously noted the following liberty interests in Youngberg:

1. Reasonable care and safety, 102 S.Ct. at 2454, 2457, 2458, 2461.

2. Freedom from bodily restraint, Id. at 2454, 2458, 2461.

3. Adequate food, shelter, clothing, and medical care. Id. at 2458.

4. Adequate training or treatment to ensure the enjoyment of liberty interests that are recognized as constitutionally required. Id. at 2460, n.25.

While the Court was careful to limit its decision to the particular circumstances of the case, the Court clearly indicated that its holding left open the existence of other, additional rights, such as a general right to habilitation or treatment. Id. at 2459.

The Court held that the standard for determining whether the constitutionally mandated treatment has been provided is that the treatment is provided according to professional judgment. Id. at 2462. Liability for money damages should be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment. Id.

Youngberg was a malpractice action for money damages resulting from inappropriate treatment. In this case, Thomas sues for prospective declaratory and injunctive relief only. The district court and court of appeals here correctly recognized that those same liberty interests in Youngberg could also be protected by injunctive relief -- to prevent further denial or harm -- if damages could be awarded for past denial of such liberties. (Court of Appeals Decision, Petition, A-3).

The particular treatment needs of Thomas S. are best illustrated by an assessment performed by Petitioner Kirk's employee, Broughton psychologist William Wellborn, contained in an affidavit submitted to the court by Kirk and quoted by the court of appeals in its decision, which included:

1. Placement in a group home with adults of average intelligence without severe emotional difficulties. (stable environment with structure).

2. Counseling by both male and female therapists regarding conflicts in establishing relationships with both men and women.

3. Exposure to many social situations outside of the instituional environment (e.g. shopping, dining out, short trips, etc.)

4. Placement in an environment that will allow balance between supervision and freedom so that Tom will not feel rejected.

5. Training in mathematics and money management.

6. Training in a specific trade like auto mechanics so that Tom will more likely be able to support himself in the future.

Petition App., A 34-35.

The district court noted that while the details of recommended treatment have varied according to the individual making the assessment, the common treatment elements are:

1. A stable environment -- i.e., a relatively permanent placement.

2. A non-institutional adult foster care situation which would allow Tom to function as a family member with some supervision but with relatively few restrictions.

3. Basic educational training and vocational training.

4. Therapy and counseling.

App. D, p. 408; see also, App. D, p. 396.

These treatment recommendations were made by petitioner Kirk's own professionals and by defendant Childress. In the face of these treatment recommendations and Thomas' unexplained six-month confinement to the Gaston County Detoxification Facility, petitioner still argues that "the Court of Appeals clearly failed to show any deference whatsoever to the decisions made by those professionals who actually arranged and provided respondent's community treatment." (Petition, 8).

The district court carefully adhered to these treatment prescriptions developed by Kirk's own experts in its summary judg-

ment order and was careful to note that future treatment should be guided by the decisions of qualified professionals. (App. D, pp. 407-409, 424-425). In its decision, the Court of Appeals went to great lengths to summarize the record that was before the district court at the time judgment was entered, and upon this record made this observation:

> We reject the Secretary's claim that geniune issues of material fact preclude summary judgment. Although the evidence presented in Thomas' behalf is voluminous, the district court did not rest on it. Instead, the court based summary judgment on the reports and recommendations of the Secretary's professionals at Broughton Hospital, which were introduced into evidence by the Secretary. The guardian, through his counsel, also acknowledged:
>
> What Tom needs is as follows:
>
> a. A room to stay in, to meet his needs for privacy, within a supervised time with resident managers;
>
> b. Provision of meals at scheduled times;
>
> c. Developmental skills training, in self-care and housekeeping as needed;
>
> d. Outside program resources, as needed:
>
> i. Vocational training
> ii. Psychosocial rehabilitation
> iii. Adult basic education
> iv. Individual therapeutic counseling
> v. Supportive/behavior counseling and
> vi. Case management.
>
> This represents a concensus of those involved in Tom's treatment for the last one and half years. If his needs are many, we point out that substituting for twenty years of no family and little or no treatment is not an easy thing.

Petition, A-19-20.

violation have been shown, "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 15 (1971).

Petitioner Kirk argues that if Thomas has a constitutional right to treatment, then the treatment provided by his agents and employees has been appropriate under the Youngberg standard. He bases his claim on Mr. Justice Powell's statement that courts "must show deference to the judgment exercised by a qualified professional." 102 S.Ct. at 2461, 73 L.Ed. at 48. If such judgment was in fact exercised, decisions concerning treatment would be "presumptively valid." 102 S.Ct. at 2462, 73 L.Ed.2d at 42. Thus, according to Kirk's reasoning, the court can look no further than to determine whether professionals have approved of Thomas' treatment while under state control or guardianship. His reasoning is erroneous for the reasons outlined below.

If the Youngberg standard requiring deference to the opinions of qualified professionals is applied correctly in Thomas' case, the undisputed facts show that he has been denied treatment prescribed by the professionals who have evaluated his needs. As outlined in the statement of facts above, the DDDL evaluation conducted before Thomas was ever admitted to Broughton in 1982 prescribed community placement. Once he was admitted to Broughton, Thomas' guardian and hospital professionals consis-

tently recommended community treatment. Nevertheless, he remained confined to Broughton for a full year. More recently, he was sent back to Broughton for his fifth hospitalization and was kept in an inappropriate geriatric rest home and a detoxification facility. (App. D, pp. 328-330, 373). Petitioner Kirk evades this denial of prescribed treatment by deeming Thomas' treatment "appropriate" since professionals have been involved in making all decisions. That those "decisions" have been seriously compromised by the acknowledged lack of needed programs and facilities is ignored by Kirk. He is content to justify his stay in Broughton for months beyond the point where professionals recommended his discharge by saying, "[i]t is in his best interest to remain at Broughton until appropriate community placement is identified . . . ." (App. C, pp. 169-170). He offers no justification in the record for his stay in the Gaston County Detoxification Facility for six months.

In effect, Petitioner Kirk's argument under Youngberg has begged the real question. He argues that because professionals were standing around while Thomas was in his custody, nothing done to Thomas is constitutionally suspect. The professionals' judgment and recommendations were severly compromised because Kirk did not allow their judgment to be implemented. Kirk ignores the undisputed professionals' judgment that Thomas should not have been placed or confined in Broughton at all in 1982, that his placements since November 1983 have been inappro-

priate, and that but for the state's unwillingness to provide the professionally prescribed community placement of Thomas, he would not have spent six months in the Gaston detoxification facility. Thomas' "treatment" has been unnecessarily restrictive of his liberty, has not provided the home place he needed, and has not provided the social and psychological setting prescribed for developing his skills.

Thomas cannot be denied appropriate treatment in this manner simply because defendants contend that there is no proper treatment available. The district court held that the lack of alternatives is not sufficient to outweigh the drastic deprivation of Thomas' personal liberty caused by the confinement at Broughton, inappropriate rest homes, and the Gaston detoxification facility. (App. D, pp. 409-410). His right to treatment is meaningless if the state is allowed to place him wherever it pleases. In a case involving a Texas juvenile facility, the court stated this principle succinctly:

> But this procedure [inquiry into whether appropriate treatment should be provided] is hollow if there are, in fact, no alternatives to institutionalization. The state may not circumvent the Constitution by simply refusing to create any alternative to incarceration; it must act affirmatively to foster such alternatives as now exist only in rudimentary form . . . and to build new programs suited to the needs of the hundreds of its children that do not need institutional care (e.g. patient clinics, home placements with close supervision.)

Morales v. Turman, 383 F.Supp. 53, 125 (E.D.Tex. 1974); rev'd 535 F.2d 864 (5th Cir. 1976); reinstated 430 U.S. 322 (1977), 97 S.Ct. 1189, 51 L.Ed.2d 368, reh. denied 430 U.S. 988.

C. There is no conflict among circuit decisions that would justify granting the petition.

Petitioner alleges that the court of appeals' decision in this case creates a conflict among the circuits regarding the individual's right to treatment in the aftermath of Youngberg. There is no conflict among the circuits, and to grant certiorari on that basis would be improvident. A review of post-Youngberg circuit court decisions cited by petitioners shows that the Court of Appeals decision in the case is not only true to Youngberg, but is also consistent with other circuit decisions.

There is no split of authority among the circuits over whether the liberty interests recognized in Youngberg could be protected by injunctive relief. The only other circuit to consider any distinction between damages and injunctive relief is the Third Circuit, which held that a defendant's constitutional treatment responsibility in cases of prospective relief is much broader. In Scott v. Plante, 691 F.2d 634 (3rd Cir.1982), the court said:

> Finally, we note that Youngberg v. Romeo involved only a claim for money damages for past infringements of the right to treatment . . . . The Court's decision does not inform at all as to the appropriate reach of injunctive relief for the protection of liberty interests created by state law, and the holding is not necessarily dispositive of the scope of prospective relief for the protection of the fourteenth amendment liberty interests which it recognized. Obviously the problem of hindsight interference with decisions made by hard-pressed staff members of state mental institutions is a more serious one than that of assisting them in directing prospective injunctive relief against appropriate state officials.

> (citation omitted). Id. at 637 cf. ARC Of North Dakota v. Olson, 561 F.Supp. 473 (1982) aff'd on other grounds, 713 F.2d 1384 (8th Cir. 1983).

691 F.2d at 637.

Thomas' case was analyzed by the fourth circuit under the Youngberg standard. Thus, the broader construction anticipated by Scott v. Plante has certainly been met also. The problem with Thomas is not that the defendants' professionals made unprofessional judgments in diagnosing his needs and prescribing a treatment program. Thomas does not challenge the recommendations of defendants' professionals. The real problem is that defendants defaulted on providing the necessary appropriate treatment. In the words of the district court, "to the extent that any professionally prescribed treatment differed from that set forth above, it differed because the professional's stated judgment was modified to conform to the available treatment, rather than to the appropriate treatment, for plaintiff's condition." (Petition App., A-36).

In Society for Goodwill to Retarded Children v. Cuomo, 737 F.2d 1239 (2nd Cir. 1984), the Second Circuit follows the same Youngberg analysis as did the Fourth Circuit Court of Appeals in the present case. In Society for Goodwill, the court analyzed the facts based on identifiable liberty interests enumerated in Youngberg. 737 F.2d at 1243-1250. In the present case, the court similarly noted that treatment must be measured by identifiable liberty interests following a Youngberg analysis. The

legal analysis in Society for Goodwill and the present case are thus consistent. Where Society for Goodwill differs is in its outcome, based on the facts before the court. In Society for Goodwill, the Second Circuit reversed a district court decision setting a quota of 400 mentally retarded patients to be released for placement in community facilities, after finding that the order was too broadly written to accomplish the intended goal. Id. at 1251.

In Thomas' case, however, the district court ordered the precise treatment prescribed by petitioner's qualified professionals. (Pet. App. A 34-36). The court of appeals correctly noted this factual difference between the two cases. (Pet. App. A 18). As this Court noted in Youngberg, "Because the facts in cases of confinement of mentally retarded patients vary widely, it is essential to focus on the facts and circumstances of the case before the court." 102 S.Ct. at 2460, n. 25. The district court clearly followed this mandate.

Petitioner also cites Phillips v. Thompson, 715 F.2d 365 (7th Cir. 1983) as conflicting with the court of appeals decision in the present case. As with Society for Goodwill, however, Phillips is clearly consistent with the present case in its intrepretation of Youngberg's constitutional requirements but differs on the facts. Phillips analyzed the plaintiff's claims to treatment based on the same identifiable liberty interests listed in Youngberg. These liberty interests served as the same analytical foundation for the present decision in Thomas S.

II. THE DISTRICT COURT PROPERLY HELD PETITIONER KIRK ULTIMATELY RESPONSIBLE FOR PROVIDING SERVICES AND SUPERVISING LOCAL GOVERNMENT AGENCIES UNDER HIS CONTROL.

A. The court properly found Petitioner Kirk liable for his constitutional violations.

In its September 17, 1984, order, the district court found:

> [Kirk] and Childress, like the institution officials in Youngberg, are responsible for the legitimate restraints on plaintiff's liberty resulting from plaintiff's mental imcompetency and wardship; also like the defendants in Youngberg, [Kirk] and Childress are charged with the responsibility that these legitimate restraints are no more restrictive than necessary.

App. D, p. 406).

Since Defendants Kirk and Childress were responsible for depriving plaintiff of his substantive due process liberty interest, the district court ordered them to take remedial action, and this was correctly affirmed by the court of appeals.

The district court noted that the local officials might "share responsibility" under a different constitutional theory. The court, found it unnecessary to "speculate . . . . on who might be responsible when it is clear that [Kirk] and Childress are responsible." (App. D, p. 413). The court, therefore, dismissed the claims against the local defendants without prejudice. Thus, the court found Defendants Kirk and Childress severally (but not necessarily exclusively) liable for constitutional violations. The propriety of a court's finding such entire liabi-

lity for relief by parties that may be jointly liable is well established in American law. Prosser, Law of Torts, 4th Ed. §52.

Contrary to Petitioner Kirk's apparent assertions, the district court did not absolve local government agencies from all responsibility. In its December 7, 1984, final judgment, the district court did not prevent state officials from working through local agencies. In fact, the district court acknowledged the role of the local agencies in furnishing Thomas S. with treatment under the judgment. (Petition, A-42). In addition, the judgment was made binding upon the agents of defendants Kirk and Childress and "those to whom they have assigned or may assign any duties or responsibilities for the care and treatment of Thomas S." (Petition, A-43). The effect of the lower court's decision is to confirm the ultimate responsibility of state officials for purposes of liability under one constitutional theory. See Alexander v. Hill, 707 F.2d 780 (4th Cir. 1983), cert. den. 104 S.Ct. 206 (1983)(state DHR officials responsible for late processing of AFDC and Medicaid applications by local D.S.S. officials).

A federal court in New York found substantive due process violations by the state and not local officials in a clearly analogous, but less compelling, case where the state and local agencies both had responsibilities. Flowers v. Webb, 575 F.Supp. 1450, 1453-1454 (E.D.N.Y. 1983). There, the court found that while the state had delegated the operation of community

programs for mentally retarded perople to local officials, the state had "a substantial responsibility for overseeing and regulating" those services. In light of that statutory scheme, the court determined that the state had "ultimate responsibility" even though the local officials had custody of plaintiff and plaintiff had apparently never been in a state facility. The court in Flowers noted that the state's statutory scheme permitted plaintiff to be admitted to the custody of the local program by plaintiff's parent. In the present case, the court noted that Thomas S., as a ward of the state, may be required at any time to return to the state institution by his guardian, a state official. (App. D, p. 405). The Flowers court also relied on Reynolds v. Sims, 377 U.S. 533, 575 (1964), to note that "political subdivisions of states have never been considered as sovereign entities" but rather as subordinate governmental instrumentalities designed 'to assist in carrying out state governmental functions.'" (quoting Reynolds). Flowers, supra at 1454.

B. The court's findings and orders do not conflict with North Carolina law.

Even if the Court were to divorce consideration of liability for relief from the underlying constitutional violation and examine North Carolina's statutory scheme of responsibility in the abstract, the district court's determination of state official responsibility is proper. Petitioner Kirk failed to explain in his brief the following responsibilities imposed on him and powers granted to him by statute:

(1) Exercising "jurisdiction over . . . joint state- and community-sponsored mental health clinics." N.C. Gen. Stat. §122-1.

(2) Establishing community-based programs. N.C. Gen. Stat. §122-35.37.

(3) Issuing, denying, or revoking operating licenses to area authorities. N.C. Gen. Stat. §§122-35.51 and 122-35.52.

(4) Implementing, administering, and monitoring community-based programs in cooperation with area authorities. N.C. Gen. Stat. §122-35.36(6).

(5) Approving the selection of the area program director and the qualifications of other professionals hired by the area program. N.C. Gen. Stat. §122-35.45(c) and (d).

(6) Paying legal fees, judgments, and settlements for agents, employees, and board members of area authorities. N.C. Gen. Stat. §122-35.40(c) and (d).

(7) Establishing and enforcing rules for area authorities. N.C. Gen. Stat. §122.35-53(g).

(8) Developing and enforcing policy and standards for providing mental health and rehabilitation services with the basic goal of assisting all citizens to achieve and maintain an adequate level of health, social and economic well-being, and dignity. He is charged with the responsibility for emphasizing, whenever possible, preventive measures. N.C. Gen. Stat. §143B-137.

(9) Supervising area mental health programs and administering standards to assure that local programs provide services and operate in compliance with state and federal laws and regulations. N.C. Gen. Stat. §122-35.38.

(10) Assuring that the local authorities and the various divisions of his department work together to assure that there is appropriate care provided for North Carolina residents suffering from mental illness or mental retardaton. N.C. Gen. Stat. §122-35.37.

(11) Providing financial and coordinative assistance to the area mental health authority to assure continuity of care for patients with mental retardation who are discharged from state mental hospitals. N.C. Gen. Stat. §122-55.8. (Thomas S. has claimed that defendants chose to treat him as mentally retarded and are therefore estopped from denying tht he is mentally retarded). (App. C, p. 46)).

(12) Making direct grants to area authorities for community-based treatment "rather than in institutions." N.C. Gen. Stat. §122-35.56.

(13) Cooperating with local health authorities in augmenting, promoting, and improving local residential programs for the mentally ill and mentally retarded. N.C. Gen. Stat. §122-1.2.

Petitioner Kirk can even contract directly with any agency, corporation, or person to fulfill his responsibilities. N.C. Gen. Stat. §143B-139.3. Yet the district court refrained from ordering him to exercise that power. Thus the court's order is temperate and consistent with North Carolina's statutory scheme.

In summary, determination of entire liability is permissible when another defendant is or might be jointly liable. The determination of liability here is rooted in the court's proper identification of the state officials as illegally restraining Thomas S.'s constitutional rights. The determination of the state's ultimate responsibility does not preclude the state from involving local officials and is consistent with North Carolina's mental health service delivery scheme. The area mental health authorities are creatures of the state and completely subject to the authority of the state. For these reasons, the district court properly determined that Petitioner Kirk is responsible for providing services to Thomas S. based on the recommendations of qualified professionals.

The local agencies that Kirk claims should be responsible for Thomas' treatment were initially named as defendents in this

action but were dismissed by the district court. Kirk failed to appeal this dismissal, so that he is now barred from claiming in his Petition that these agents who were dismissed should be totally responsible for treatment.

CONCLUSION

Thomas is in critical need of the treatment ordered under the judgment. According to a letter to the district court from counsel for defendant Childress:

> If appropriate treatment is not provided to Tom he will likely:
>
> a. Become a chronic inmate of Broughton Hospital; or
> b. Be warehoused and medicated in a rest-home for the indefinite future; or
> c. Get in trouble with the law; or
> d. Live or perish as a "street person."

(App. D, pp. 396-297).

Thomas has shown that he is constitutionally entitled to receive the treatment prescribed for him. The petition for certiorari should therefore be DENIED.

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